



# INTERNATIONAL PARENTAL ABDUCTION

## The Hague Abduction Convention & Ex Parte Custody Orders

**DISCLAIMER:** The information in this fact sheet is provided for general information only. The issuance of *ex parte* orders is controlled by the separate laws of the fifty states and the District of Columbia, as well as state and local practices. It is possible that some states might use *ex parte* orders in ways not reflected in this circular. While some of the information is about legal issues, it is not legal advice. Questions involving interpretation of specific court orders should be addressed to a private attorney.

When an abduction occurs, some left-behind parents seek and obtain *ex parte*<sup>1</sup> orders granting them temporary custody of the abducted child. Because the Hague Abduction Convention explicitly requires judges to examine pre-abduction custody rights when determining whether return is required under the Convention, these *ex parte* orders do not help the parent to secure a return or otherwise affect the relevant analysis under the Convention. They also are not relevant to ultimate custody decisions made under U.S. law. However, U.S. law enforcement officials often direct parents to obtain such orders before they will help a left-behind parent to recover, or even simply to locate, an absent child. As a general matter, state law recognizes that married parents share equal (or joint) custody of their children. Unless there is a court order or written, enforceable agreement elevating one parent's rights, those parents share equal rights to make decisions for the child, including where the child resides and how he or she is raised. Consequently, many state law enforcement officials will not help a left-behind parent unless that parent first obtains a custody order indicating that the parent has a superior right to custody of the child.

Because the provision of notice and an opportunity to be heard to the opposing party is a bedrock principle of American law, *ex parte* custody orders are widely disfavored by U.S. courts and are generally granted only in emergency situations. In order to obtain an *ex parte* order, the applicant must prove that exigent circumstances exist that require the court to take emergency action. Courts are particularly reluctant to issue *ex parte* orders in custody cases and require a high showing of danger before they will do so. In abduction cases, some courts will issue *ex parte* orders if they can make the requisite showing that emergency circumstances exist, particularly where that order is necessary to locate and recover the child.

If issued, these *ex parte* orders do not lodge permanent custody with the left-behind parent. Rather, these orders are designed only to stabilize matters until a full hearing on the merits can be convened. They are issued without prejudice to the rights of the absent parent and contemplate that custody will be fully adjudicated once both parties have received notice and an opportunity to present evidence. These orders do not represent an adjudication of custody rights or grant custody to the left-behind parent in any lasting way: they are simply intended to stabilize the child's situation until a court can make a custody determination. Two federal statutes addressing child custody issues mandate that permanent custody determinations cannot be made until reasonable notice and an opportunity to be heard has

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been afforded to both parents. Any custody order issued in contravention of these requirements is likely to be unenforceable. Since *ex parte* orders are generally recognized to be temporary place-holders, many *ex parte* orders are expressly time-limited and automatically expire after a certain period of time (e.g. two weeks in some states). Other orders designate an event – i.e. the return of the child – that would cause the order to expire and direct the parties to return to court for a full custody hearing once that event has occurred.

Furthermore, *ex parte* orders do not have any substantive or evidentiary import in the ultimate hearing on the merits. While the behavior of the abducting parent might factor into the judge's ultimate decision, the *ex parte* order itself has no impact. The custody determination is *de novo* and is based on the standard of what is in the child's best interests.<sup>2</sup> Depending on the evidence presented, the judge could order any custody arrangement that is in the child's best interests, including custody to the abducting parent. The *ex parte* order itself is not relevant to that determination.

Finally, *ex parte* orders can be vacated or modified by petition of either of the parties. An abducting parent considering returning to the United States with the abducted child might be concerned that when the child returns to the United States, the *ex parte* order will automatically vest full custody of the child with the left-behind parent. While it is true that the *ex parte* order might temporarily grant full custody to the left-behind parent, the abducting parent can immediately petition the court to vacate or modify that *ex parte* order and, pending the full custody hearing, enter a temporary custody arrangement that accommodates both parties and is in the child's best interests. In any event, the case will be set down for a full hearing on the issue of custody and this ultimate determination will replace any temporary rights created by the *ex parte* order.<sup>3</sup>

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<sup>1</sup> *Ex parte* orders are those that are issued without providing reasonable notice and an opportunity to be heard to the opposing party.

<sup>2</sup> The standard for making a custody determination between parents is what is in the child's best interests. There is a different standard for custody determinations between a parent and a third-party (e.g. a grandparent or other relative).

<sup>3</sup> It is also important to note that *ex parte* orders may not be enforceable in states other than the state in which they were issued.